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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 74-1194

RAYMOND K. PROCUNIER, et al.,
Petitioners,

vs.

JOHN WESLEY CLUTCHETTE, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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The petitioner, J.J. Enomoto, successor in interest as Director of the California Department of Corrections to Raymond K. Procunier, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 21, 1974.

OPINIONS BELOW

The Court of Appeals' Opinion on Rehearing was entered on October 21, 1974 and is not yet reported but is reproduced in the Appendix hereto. The opinion of the Court of Appeals entered April 25, 1974 is reported at 497 F.2d 809 and affirms the opinion of the District Court for the Northern District of California entered on June 21, 1971 which is reported at 328 F.Supp. 767.

JURISDICTION

The Court of Appeals' opinion on Rehearing was entered October 21, 1974. On January 23, 1975 petitioner's request for an extension of time within which to file this petition was granted to and including March 20, 1975. A timely suggestion for rehearing en banc was denied by the Circuit Court on February 28, 1975.

This Court's jurisdiction is envoked under Title 28, United States Code section 1254(1).

QUESTION PRESENTED

Should the Court of Appeals or the administrators of the California prisons exercise the discretion conferred by *Wolff v. McDonnell,* 418 U.S. 539 (1974) to determine the most appropriate procedure for conducting prison disciplinary proceedings?

STATUTORY PROVISION INVOLVED

California Penal Code section 5054—CONTROL OF PENAL INSTITUTIONS AND INMATES.

> The supervision, management and control of the state prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the Director.

STATEMENT OF THE CASE

On November 20, 1970 respondents, inmates of the California state penal institution at San Quentin, filed a complaint for injunctive relief and damages in the United States District Court for the Northern District of California. A hearing on their motion for a preliminary injunction was held December 4, 1970 and on June 21, 1971 the District Court entered a declaratory judgment that the disciplinary procedures employed by petitioners at San Quentin State Prison violated the due process and equal protection clauses of the Fourteenth Amendment. Petitioners were permanently enjoined from conducting further disciplinary hearings under those procedures and ordered to submit a plan for the conduct of discliplinary hearings consistent with the opinion of the district court. *See Clutchette v. Procunier,* 328 F.Supp. 767, 784-785 (N.D. Cal. 1971).

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit. A panel of that Court, Judge Kilkenny concurring and dissenting,

affirmed the order of the district court and extended the scope of the ordered protections to cover disciplinary proceedings involving even the "temporary suspension of 'privileges.'" *Ciuchette v. Procunier*, 497 F.2d 809, 815 (9th Cir. 1974).

Petitioners moved for rehearing, rehearing en banc and for modification of the opinion. Rehearing was granted by the original panel but limited to the impact of this Court's decision in *Wolff v. McDonnell*, 418 U.S. 539 (1974). Thereafter, on October 21, 1974 the panel issued an Opinion on Rehearing, Judge Kilkenny again dissenting, modifying in three particulars its earlier opinion, which it otherwise reaffirmed "because the remaining portions are in harmony with *Wolff* or are related to issues untouched by *Wolff*." *See* Appendix, p. ii. Petitioners filed a timely suggestion for rehearing en banc on November 4, 1974. Because this suggestion did not stay the issuance of the mandate [Rule 35(c), Federal Rules of Appellate Procedure] petitioners requested and were granted an extension of time to and including March 20, 1975 within which to petition this Court for a writ of certiorari. *See* Appendix, p. viii.

On February 28, 1975 petitioners' suggestion for rehearing en banc was denied by the Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

This Court carefully noted that its conclusion that certain procedural due process safeguards were required in prison disciplinary proceedings was not "graven in stone." *Wolff v. McDonnell,* 418 U.S. at 571-572. This Court did, nevertheless, set forth constitutionally compelled minimum requirements of procedural due process appropriate in prison disciplinary proceedings. *Wolff v. McDonnell,* 418 U.S. at 558. It then committed, within the limits set, the continuing development of procedural due process in this area to "the sound discretion of correctional officials administering the scope of such inquiries." *Wolff v. McDonnell,* 418 U.S. at 568. This Court recognized that "[t]he better course at this time, in a period where prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons." *Wolff v. McDonnell,* 418 U.S. at 569. Petitioners respectfully submit that the procedures imposed on them as "constitutional minimums" by the Court of Appeals [*Clutchette v. Procunier,* 497 F.2d at 818] exceed the protections outlined in *Wolff* and therefore unduly circumscribe the exercise of their discretion as prison administrators for the State of California. We therefore respectfully request this Court to reverse the Court of Appeals opinion to the extent it imposes procedural protections greater than afforded by *Wolff.*

The Court of Appeals by its opinion in this case has, we submit, usurped the discretion conferred by *Wolff v. McDonnell,* 418 U.S. 539 (1974) upon the

administrators of the various prison systems in this nation to determine the most appropriate procedures for administering inmate discipline. Petitioners, the administrators of the California prison system, seek review of the Court of Appeals opinion because it has unduly constrained the discretion, recognized in *Wolff* as necessarily conferred upon them, to create appropriate procedures for conducting prison disciplinary proceedings. Under *Wolff* the federal government, the 50 states, Puerto Rico, the Virgin Islands, the Canal Zone and Guam are able, within the constraints of that opinion, to adopt procedures for administering inmate discipline in their penal institutions. The Court of Appeals decision, however, requires Washington, Oregon, Idaho, Montana, Arizona, Nevada, Hawaii, Alaska, Guam and California, which administers the largest prison population in this country, to conform to the additional restraints. If allowed to stand the Court of Appeals opinion will render these states unable to adopt procedures which prove effective upon experimentation in such states as Massachusetts, New York, Pennsylvania, South Carolina, Texas, Ohio, Wisconsin, Minnesota, and Colorado. And, the federal prisons will be compelled to employ "Ninth Circuit" rules throughout their system or adopt different rules on the basis of geography. In effect, the pool of professional experience from which new procedures can be expected to develop has been reduced by the Court of Appeals opinion from over 50 (the number of states and territories) to 10 (the number of federal circuits).

Petitioners, the administrators of the California Department of Corrections, were ordered by the district court to submit a plan for inmate discipline which they voluntarily implemented shortly after that court's opinion in *Clutchette v. Procunier,* 328 F.Supp. 767 (N.D. Cal. 1971). This plan, reproduced in the Appendix, was subsequently modified to conform with *Wolff v. McDonnell, supra.* It has not been accepted by the district court and has been objected to by respondents. The administrators of the California prison system seek this petition to insure their continued ability to adopt new procedures and modify existing ones as experience dictates. The question, put bluntly, is: Who is to exercise the discretion conferred by *Wolff v. McDonnell, supra?* This Court has said petitioners, the administrators of California prisons. The Court of Appeals has made serious inroads upon that discretion. Petitioners, the administrators of California's prisons ask this Court to restore this discretion to them.

ABSOLUTE RIGHT TO COUNSEL

When an inmate is required to appear before a prison disciplinary committee charged with violating a prison rule which may also be punishable as a crime by state authorities, the Court of Appeals requires that he be represented by an attorney either retained or appointed. *Clutchette v. Procunier,* 497 F.2d at 823. This holding of the Court of Appeals is purportedly based on several opinions of this Court con-

cerned with the protection of the Fifth Amendment privilege against self-incrimination, primarily *Miranda v. Arizona,* 394 U.S. 436 (1966) and *Mathis v. United States,* 391 U.S. 1 (1968). The Court of Appeals found prison disciplinary committee hearings to be "a subtle form of interrogation" [*Clutchette v. Procunier,* 497 F.2d at 823] thus requiring the giving of *Miranda* warnings.

The opinion purports to give petitioners several alternative procedures by which to comply with this holding. The Court of Appeals suggests that "adequate protection is provided by postponing disciplinary action until after criminal proceedings have been completed." *Clutchette v. Procunier,* 497 F.2d at 823. While this is the choice currently being used in the California State Prisons [*see* Director's Rule DP-4508, Appendix, pp. xx-xxi], it is not entirely satisfactory. It precludes "swift" imposition of discipline [*compare, Wolff v. McDonnell,* 418 U.S. at 563] and has led to the charge we are "relabelling some disciplinary proceedings as 'administrative classifications.'" *See Clutchette v. Procunier,* Opinion on Rehearing. Appendix, p. vi. What has resulted is that whenever petitioners seek to raise the level of custody of an inmate accused of a disciplinary infraction who is also awaiting trial in the state courts, respondents claim that the full implementation of *Miranda,* including the appointment of counsel and an adversary hearing, is required.

The other alternative suggested by the Court of Appeals in its opinion is for petitioners to guarantee

the accused inmate's right to remain silent, without that silence adversely affecting him and provide *Miranda* safeguards including the furnishing of counsel.[1] Or, the Court of Appeals suggested petitioners could require the inmate to speak in which case use immunity would flow as a necessary consequence of the compelled disclosure. *Clutchette v. Procunier,* 497 F.2d at 824 n.23.

It is this extension of the absolute right to counsel into prison disciplinary procedures, when the charged violation may also be punishable as a crime, to which petitioners object. They submit it is an unwarranted conscription of their discretion to administer prison discipline and stems from the Court of Appeals' failure to strike a reasonable accommodation between the interests of the inmates and the needs of the institutions. The Court of Appeals' opinion places petitioners "in an inflexible constitutional straight jacket" contrary to *Wolff v. McDonnell,* 418 U.S. at 563.

Petitioner, as Director of the California Department of Corrections, administers the largest prison population in this country. One of the most common

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[1]The procedure employed by petitioners in holding disciplinary proceedings prior to the district court's opinion in this case called for the inmate to be advised of his *Miranda* rights, but informed that an attorney would not be appointed to represent him because the committee would not ask him questions. Although, the inmate would be afforded an opportunity to speak if he wished, his silence, should he elect to remain silent, would not be used against him. The district court found this procedure impermissible and that finding was affirmed by the Court of Appeals. Hence, petitioners are left to conclude that the Court of Appeals requires by "*Miranda* safeguards" the admonition of constitutional rights and the furnishing of counsel. *Compare, Clutchette v. Procunier,* 497 F.2d at 824 n.23.

disciplinary offenses which occurs in our institutions is the possession of a weapon, which is also a felony offense punishable by imprisonment for a term of not less than three years. Calif. Penal Code § 4502. But, experience teaches that few criminal prosecutions are ever brought for mere possession of a weapon. However, because of the possibility of criminal prosecution the Court of Appeals opinion requires that petitioners afford the accused inmate counsel or postpone the disciplinary hearing. What purpose does counsel at such a prison disciplinary hearing serve? Formal rules of evidence which would prevail in a trial are not used in prison disciplinary cases. *See Clutchette v. Procunier,* 497 F.2d at 818 n.16; Director's Rule DP-4507, Appendix, pp. xvii-xx. There is no likelihood that substantial rights would be sacrificed if an inmate failed to raise a proper objection or to take a timely appeal. The need for legal skill in conducting these hearings is minor. *Compare, Sostre v. McGinnis,* 442 F.2d 178, 196 (2nd Cir. 1971). The sole reason advanced for requiring counsel where the accused's conduct may also be punishable as a state criminal offense is to protect the inmate's Fifth Amendment right against self-incrimination.

Petitioners respectfully submit the accused inmate's right against self-incrimination can be adequately protected by a less onerous procedure. Inmates charged with criminal conduct can be fully advised of their rights pursuant to *Miranda v. Arizona,* 384 U.S. 436 (1966). They can thereafter be informed that they will not be questioned by the dis-

ciplinary committee but may, if they wish, waive their Fifth Amendment right against self-incrimination, and make a statement in their own behalf. They can be further advised that the exercise of their right to remain silent will not be considered adversely to them by the committee. Petitioners would like to explore this procedure, however, the district court rejected it on the basis that the inmate's ability to present a defense at the disciplinary hearing would be unduly hampered if he exercised his right to remain silent. *See Clutchette v. Procunier,* 328 F.Supp. at 779. Petitioners respectfully submit that because of the informal nature of the disciplinary committee hearings and the due process safeguards afforded by this Court's opinion in *Wolff,* the inmate can present his defense without forfeiting his right to remain silent. Due process, particularly in prison disciplinary proceedings, should require no more.[2]

An inmate facing a possible felony prosecution as a result of an alleged infraction of an institutional rule which is also punishable as a crime is confronted with a burdensome choice. However, a potential defendant in a criminal case may be put to the admittedly difficult choice of asserting the privilege against self-incrimination in a related disciplinary proceeding or

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[2]Additionally, the district court noted that representation by counsel would assist the inmate in determining whether or not it was to his advantage to waive his Fifth Amendment right to silence. *See Clutchette v. Procunier,* 328 F.Supp. at 778 n.6. Petitioner is unaware of any case authority supporting the proposition that a person suspected of criminal conduct, after being fully advised of his *Miranda* rights, is entitled to counsel before determining whether to exercise or waive his right to remain silent.

foregoing the opportunity to make a statement in his behalf. *Compare, United States v. Kordel,* 397 U.S. 1 (1970). Neither a potential nor actual criminal defendant has a constitutional right to be relieved of the burden of this choice. In *DeVita v. Sills,* 422 F.2d 1172, 1178 (3rd Cir. 1970), the petitioner, a state judge, was awarded an injunction against pending disbarment proceedings until his criminal trial arising from the same act was completed. Relying on *Gardner v. Broderick,* 392 U.S. 273 (1968); *Spevack v. Klien,* 385 U.S. 511 (1967) and *Garrity v. New Jersey,* 385 U.S. 493 (1967), he argued that to hold the disbarment proceeding prior to criminal trial would unduly burden the exercise of his privilege against self-incrimination so as to violate the Fifth Amendment.[3] The Third Circuit reversed noting that petitioner could assert the privilege at the disbarment proceeding without being punished merely for exercising that right. *DeVita v. Sills,* 422 F.2d at 1177. Due process requires no more.

The burden imposed by this choice upon inmates charged with disciplinary infractions is neither unnecessary nor excessive, and serves the legitimate state interest of insuring "swift" discipline in penal institutions. *Compare, Wolff v. McDonnell,* 418 U.S. at 563. Since the purpose of this procedure is not to

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[3]An analysis of those cases reveals that they are inapposite to the situation presented at a prison disciplinary hearing based upon an alleged infraction of prison rules which may also be punished as a felony. In each of those cases the petitioner was punished for the mere exercise of his constitutional right to remain silent. *Compare, Gardner v. Broderick, supra,* at 274; *Spevack v. Klein, supra,* at 514 and *Garrity v. New Jersey, supra* at 496-497.

prevent the exercise of a constitutional right petitioners' believe it comports with due process and avoids the drastic remedy fashioned by the Court of Appeals. *See United States v. Jackson,* 390 U.S. 570, 581-582 (1968).

Petitioners recognize that due process requires an opportunity to present a defense. Thus, the procedures for conducting a disciplinary hearing where the charge is also a felony must provide a method by which the accused inmate who desires to remain silent can present relevant evidence in his own behalf. Such procedures are available to every accused inmate in California. The due process safeguards announced by this Court in *Wolff* afford an inmate who exercises his right to silence the opportunity to present a meaningful defense. But, where the evidence before the disciplinary committee is sufficient to support their finding that the inmate violated an institution rule, discipline may be imposed even though the inmate has exercised his Fifth Amendment right to remain silent. *Compare, Malloy v. Hogan,* 378 U.S. 1, 8 (1964). Petitioners respectfully submit that where the *Miranda* admonitions are given, an inmate can, without being afforded the assistance of counsel, be required to decide whether or not he wishes to waive his right to silence or make a statement to the disciplinary committee. If he asserts the right to silence he can present other evidence in his behalf[4] and due process is satisfied.

[4]Letters, affidavits, and other materials that would not be admissible in a criminal trial may be presented by the inmate to the disciplinary committee. *Clutchette v. Procunier,* 497 F.2d at 818 n.16.

Petitioners submit that this Court's holding in *Wolff*, that there is no right to counsel in prison disciplinary proceedings, when read against the record in that case, establishes that the mere fact the misconduct charged against the inmate is also punishable as a crime does not necessarily require the presence of counsel. The district court's opinion in *McDonnell v. Wolff*, 342 F.Supp. 616 (D. Neb. 1972) reversed, 483 F.2d 1059 (8th Cir. 1973), reversed, *Wolff v. McDonnell*, 418 U.S. 539 (1974), states that the evidence established that some of the plaintiff inmates had been disciplined for insurrection, threatening an officer's life, possession of contraband, fighting and drunkenness. The Eighth Circuit reversed and remanded to the district court to specifically determine "the circumstances in which counsel may be required." *Wolff v. McDonnell*, 483 F.2d at 1063. Thus, although discipline was imposed for acts which were criminal and the Court of Appeals recognized the possibility that some circumstances might require counsel, this Court rejected the suggestion that at this stage in the development of procedures for the conducting of prison disciplinary hearings there is a constitutionally compelled right to counsel. *Wolff v. McDonnell*, 418 U.S. at 570. Petitioners respectfully submit this Court was aware of the problems presented when inmates are accused of disciplinary infractions which may also be penal violations, yet, as a reasonable accommodation between the competing interests, found counsel not constitutionally required.

This Court's concluding discussion of procedural due process safeguards required in prison disciplinary proceedings stated:

> "It is our view, however, that the procedures we have now required in prison disciplinary proceedings presents a reasonable accommodation between the interest of the inmate and the needs of the institution." *Wolff v. McDonnell,* 418 U.S. at 572.

Following this sentence is a lengthy footnote [*Wolff v. McDonnell,* 418 U.S. 572-573 n.20] which sets forth the split of authority on "reasonable accommodation" which had occurred in the Circuits. The opinion we seek to have reviewed on certiorari is cited and discussed many times. It is cited several times as an example of an authority which has reached the same "reasonable accommodation." On other occasions it is given as an example which does not represent a reasonable accommodation between the competing interests. It is so cited for its holding that there is an unrestricted right of inmates to call witnesses and cross-examine.[5] It is, we submit, similarly cited for its discussion of the right to counsel.[6]

ABILITY TO CALL WITNESSES

This Court in discussing the accused inmate's ability to call witnesses in his defense to prison disciplinary hearings recognized that;

> "Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may

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[5]This portion of the Court of Appeals' opinion was modified on rehearing. *See* Appendix, pp. iv-v.

[6]This portion of the Court of Appeals' opinion was reaffirmed on rehearing. *See* Appendix, pp. v-vi.

> create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence. Although we do not prescribe it, it would be useful for the Committee to state its reasons for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazard presented in individual cases. Any less flexible rule appears untenable as a constitutional matter, at least on the record made in this case." *Wolff v. McDonnell,* 418 U.S. at 566.

Yet, the Court of Appeals prevents petitioners from refusing to call witnesses requested by the inmate for any reason other than "to prevent repetitiousness." *Clutchette v. Procunier,* 497 F.2d at 818.

Petitioners do not object to giving reasons for refusing to call witnesses requested by accused inmates. Director's Rule DP-4507 provides that the reasons for not calling a witness requested by an inmate will be documented and a copy given to the inmate. *See* Appendix, p. xviii. Petitioners object to the additional limitation imposed on them as constitutionally compelled by the Court of Appeals [*Clutchette v. Procunier,* Opinion on Rehearing Appendix, p. ii] which is more restrictive than those detailed in *Wolff v. McDonnell,* 418 U.S. at 567-568.

CONFRONTATION AND CROSS-EXAMINATION

Recognizing that these rights present the greatest hazard to institutional interests and that an adequate basis for decision in prison disciplinary cases can be arrived at without cross-examination and confrontation, this Court concluded that the Constitution does not require the imposition of these procedures. *Wolff v. McDonnell,* 418 U.S. at 567-568. This Court left the resolution of whether, in any given case confrontation and cross-examination would be helpful in prison disciplinary proceedings, to the "sound discretion of the officials of state prisons." *Wolff v. McDonnell,* 418 U.S. at 569.

Initially, the Court of Appeals required, as constitutionally compelled, confrontation and cross-examination in prison disciplinary cases. *Clutchette v. Procunier,* 497 F.2d at 818-820. That portion of their opinion was modified on rehearing. *See Clutchette v. Procunier,* Opinion on Rehearing, Appendix, pp. iv-v. The Court of Appeals' Opinion on Rehearing agrees with this Court's determination that when these procedures should be imposed is committed to petitioners' sound discretion. But, that court severely circumscribed the exercise of that discretion under the guise of proscribing a "method by which the soundness of the discretion thus accorded could be subjected to scrutiny." *See Clutchette v. Procunier,* Opinion on Rehearing, Appendix, p. iv. According to the Court of Appeals only four reasons may validly support a denial of the opportunity for cross-examination and

confrontation.[7] The Court of Appeals bases its reasoning on the assumption that these were the only ills with which this Court was concerned in *Wolff*. Apart from the four reasons which the Court of Appeals believed were the only ones which would support the denial of the opportunity for confrontation and cross-examination, this Court was also concerned that imposing these procedures would mean that prison disciplinary proceedings would inevitably be longer, tend to unmanageability and give rise to substantial resentment which would hinder the rehabilitative process. *Compare, Wolff v. McDonnell,* 418 U.S. at 567, 569. Petitioners respectfully submit that the Court of Appeals' opinion has improperly encased "the disciplinary procedures in an inflexible constitutional straitjacket" contrary to the principles announced in *Wolff v. McDonnell,* 418 U.S. at 563.

A DECISION BASED ON THE EVIDENCE PRESENTED

The Court of Appeals' opinion precludes the disciplinary committee from considering information which was not presented at a hearing attended by the inmate. This holding is premised on the grounds that any other procedure would violate the inmate's right to confrontation and cross-examination. *Clutchette v. Procunier,* 497 F.2d at 820. The Court of Appeals modified its opinion in accordance with *Wolff* so that

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[7]The four reasons are: risk of reprisal; unmanageability; disruption; and safety of prison personnel. *Clutchette v. Procunier,* Opinion on Rehearing, Appendix, p. v.

confrontation and cross-examination are not required. *See Clutchette v. Procunier,* Opinion on Rehearing, Appendix, pp. iv-v. However, that court did not modify its requirement that the disciplinary committee must make its factfinding determinations based solely on evidence presented at a hearing attended by the accused inmate. Petitioners respectfully submit this requirement goes beyond constitutionally mandated minimums of procedural due process for prison disciplinary proceedings and unduly restricts their discretion.

The Nebraska regulations challenged in *Wolff* provided that the disciplinary committee could conduct additional investigation if it desired after the hearing was held and before punishment was imposed. *Wolff v. McDonnell,* 418 U.S. at 553. Implicit in this Court's discussion of the twin safeguards of "advance written notice" and "a written statement of the factfinders as to the evidence relied upon" [*Wolff v. McDonnell,* 418 U.S. at 563-564] is the principle that the accused inmate must be afforded an opportunity to reply to any evidence against him upon which the disciplinary committee may rely in reaching its decision. But, this Court recognized that the committee may receive and consider information not made available to the accused inmate.

> "It may be that there will be occasions when personal or institutional safety are so implicated, that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission." *Wolff v. McDonnell,* 418 U.S. at 565.

Petitioners respectfully submit that procedural due process requires only that the accused inmate be given an opportunity to respond to any evidence adverse to him which may be considered by the disciplinary committee before reaching its decision. He can be afforded this opportunity either by appearing in person before the committee or by submitting a documentary response.

This Court in *Wolff* required the disciplinary committee to file a written statement of the evidence relied upon including the reasons for the discipline imposed. *Wolff v. McDonnell*, 418 U.S. at 564.[8] Petitioners respectfully submit that this requirement renders unnecessary the imposition of the additional procedure that the decision of the disciplinary committee be based solely on evidence presented at a hearing.

CONCLUSION

The only relief available to respondents in federal court would be an injunction enjoining the prospective enforcement of invalid prison regulations. *Wolff v. McDonnell*, 418 U.S. at 555. They are not entitled to retroactive application such as directing expungement from their prison records of previous disciplinary proceedings conducted without affording these minimum procedural due process safeguards. *Wolff v. McDonnell*, 418 U.S. at 573-574. The current rules and

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[8]This procedure was also ordered by the Court of Appeals [*Clutchette v. Procunier*, 497 F.2d at 820], and is incorporated in the petitioners' current rules for inmate discipline. *See* Director's Rule DP-4507, Appendix, p. xx.

regulations of the California Director of Corrections setting forth the procedural safeguards to be afforded in prison disciplinary hearings are reproduced in the Appendix, pp. ix through xxviii. Petitioners submit they comport with, and exceed, the minimum procedural due process safeguards required by *Wolff v. McDonnell, supra.* We therefore respectfully request this Court to issue a writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit, reverse and remand the case with directions to dismiss.

Dated, March 18, 1975.

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(Appendix Follows)

APPENDIX

Appendix

United States Court of Appeals
for the Ninth Circuit

No. 71-2357

John Wesley Clutchette, et al.,
Appellees,

vs.

Raymond K. Procunier, et al.,
Appellants.

[October 21, 1974]

Appeal from the United States District Court
for the Northern District of California

OPINION ON REHEARING

Before: TUTTLE,* HUFSTEDLER, and KILKENNY, Circuit Judges.

HUFSTEDLER, Circuit Judge:

We granted rehearing to assess the impact of *Wolff v. McDonnell* (1974) ..... U.S. ..... [42 U.S.L.W. 5190] upon our prior opinion stating the constitutional protections due inmates of San Quentin prison in the context of prison disciplinary proceedings (497 F.2d 809). We modify our opinion in respect of loss of privileges, confrontation and cross-examination of

*Honorable Elbert P. Tuttle, Senior Judge, Fifth Circuit, sitting by assignment.

witnesses, and the right to counsel or a counsel-substitute in disciplinary proceedings (other than those involving infractions also punishable by state authorities as crimes) to conform it to the views expressed in *Wolff*. We reaffirm our prior opinion in all other respects because the remaining portions are in harmony with *Wolff*, or are related to issues untouched by *Wolff*.

We are mindful of the Court's encouragement of the continued development of prison disciplinary procedures and of experiments within the disciplinary context directed toward rehabilitative goals. We are particularly aware of the Court's admonition that the minimum constitutional protections mandated by *Wolff* are not "graven in stone" (..... U.S. ..... [42 U.S.L.W. at 5200]) and that the underlying constitutional concepts will be subject to reevaluation as changes in prison discipline evolve.

I.

"Privileges"

Our prior opinion extended the due process protections therein described "[e]ven [to] a temporary suspension of 'privileges' by restricting the prisoner's activities to a greater extent than the general prison population . . . ." (497 F.2d at 815.) Because the Court in *Wolff* suggested that the due process procedures it commanded might not be required in proceedings involving "lesser penalties such as the loss of privileges" (..... U.S. at ..... [42 U.S.L.W. at 5200 n.19]), we reconsider the point.

Any deprivation of the small store of "privileges" accorded a confined or relatively confined group causes a far greater sense of loss than a similar deprivation in a free setting as anyone can attest who has been a student in a strict boarding school, a sailor aboard ship, a combat soldier, or a prisoner in time of war or peace. Within prison walls, the denomination "privileges' can encompass a host of matters, ranging from simple amenities through such cherished concerns as access to visitors, schooling, recreation, and institutional employment. Grievousness of the loss depends upon the nature and extent of the privileges withdrawn for disciplinary purposes and upon the circumstances and makeup of the prisoner who suffers the loss. Deprivation of the more highly valued privileges can have as debilitating an effect on the amenability of a prisoner to rehabilitation as the loss of some good-time credit or a period of isolation from the general prison population. We therefore believe that some process is due to prisoners whose privileges are to be removed. Because the severity of the loss of privileges depends on multiple variables, we do not purport to draw a detailed constitutional blueprint governing the removal of privileges for disciplinary purposes. Process due can and should be flexible to meet the exigencies of the situation. We require only that any plan establishing disciplinary procedures attending withdrawal of privileges embrace at least these due process minima: A prisoner subject to removal of one or more privileges (1) must be given notice of intent to remove one or more stated privileges, (2) together with a statement of grounds for

removal, (3) at a reasonable time before discipline is imposed, and (4) must be given an opportunity to respond before such discipline is imposed. We leave to the prison administration the fashioning of a plan to implement these guarantees, with appropriate regard for the seriousness of the infraction, the severity of the deprivation, and the circumstances of the affected prisoner.

II.

Confrontation and Cross-Examination

Wolff held that confrontation and cross-examination are not "at the present time" constitutionally compelled. (..... U.S. at ..... [42 U.S.L.W. at 5199].) "[I]n the current environment, where prison disruption remains a serious concern to administrators, we cannot ignore the desire and effort of many States, including Nebraska and the Federal Government, to avoid situations that may trigger deep emotions and that may scuttle the disciplinary process as a rehabilitation vehicle." (*Id.*) The Court thereupon committed the allowance or denial of confrontation and cross-examination "to the sound discretion of the officials of state prisons." (*Id.*)

The Court did not prescribe any method by which the soundness of the discretion thus accorded could be subjected to scrutiny. We do so now. Whenever a prisoner requests and is denied the privilege of confrontation and cross-examination in a disciplinary proceeding in which a serious sanction can be imposed (excluding a proceeding for an infraction that is also a crime), the prison authorities must enter in the rec-

ord of the proceeding and make available to the prisoner an explanation for the denial. Failure to make that explanation or an explanation setting forth reasons not related to the prevention of those ills about which the Supreme Court was concerned—reprisals, unmanageability, disruption, safety of prison personnel—will be deemed prima facie evidence of abuse of discretion that can be called to the attention of parole authorities and, under appropriate circumstances, of the courts as well.

III.

Counsel and Counsel-Substitutes

In *Wolff*, the Court declined to hold "that inmates have a right to either retained or appointed counsel in disciplinary proceedings." (..... U.S. at ..... [42 U.S.L.W. at 5200].) "Where an illiterate inmate is involved, however, or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff." (*Id.*)

A provision for counsel-substitute does not depend upon the seriousness of the disciplinary sanction threatened, as we had contemplated in our prior opinion, but, under *Wolff*, turns on the ability of the prisoner to handle his own case. The consideration is crucial because any guaranty of process due is empty if the particular inmate is incompetent meaningfully

to avail himself of it. Accordingly, we hold that in submitting a plan to the district court, the prison authorities must make provision for a counsel-substitute whenever a prisoner subjected to disciplinary proceedings is unable competently to handle his case without help.

Wolff did not reach the question of the right to counsel when a prisoner "is required to appear before a prison disciplinary committee for violation of a prison rule which may also be punishable by state authorities." (497 F.2d at 323.) Nothing in *Wolff* suggests to us that our reasoning or our conclusion on this issue requires reconsideration, and we decline the appellants' request that we do so.

Finally, respondents complain that the prison authorities seek to avoid the due process protections that the Supreme Court and we have required by relabeling some disciplinary proceedings as "administrative classifications." If the complaint has foundation, the ruse will be defeated. But the record before us does not reveal any facts bearing on the issue, and the district court has not had an opportunity to consider it. If any facts do exist tending to support the claim, they can be developed on remand.

We adhere to our prior opinion as herein modified. The cause is remanded for further proceedings consistent with the views herein expressed.

KILKENNY, Dissenting:

I would vacate and remand to the district court for a full fledged hearing in which the court would deter-

mine and judicially declare whether appellants' disciplinary rules and regulations, *currently in effect,* meet the four constitutional requirements enunciated in *Wolff v. McDonnell,* ..... U.S. ..... (June 26, 1974). If the court finds that the procedural due process safeguards required by *Wolff* are recognized in the current rules and regulations, the case should be dismissed. Otherwise, the court should direct appellants to amend the rules and regulations to comply with such safeguards.

Supreme Court of the United States

No. A-591

Raymond K. Procunier, et al.,
Petitioners,

vs.

John Wesley Clutchette, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 20, 1975.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 23rd day of January, 1975.

STATE OF CALIFORNIA

Department of Corrections
Rules and Regulations
of the
Director of Corrections
Concerning Inmate Discipline

With revisions through January 10, 1975

PREFACE

These Rules and Regulations of the Director of Corrections for administration of the department and all of its components are issued under the authorization granted to the Director by Penal Code Section 5058. These Rules and Regulations supersede those previously in effect and are subject to change upon notice in writing. They may be modified or suspended only by the Director of Corrections.

It is not intended that these Rules and Regulations will conflict in any way with the provisions of the Constitution or laws of the United States or the State of California, or with the regulations of any agency of State Government which is entitled by law to exercise control over any of the functions of the Department of Corrections.

The contents of this book are organized to include an introduction which summarizes laws applying specifically to inmates. The first three chapters cover regulations applying to inmates, which both inmates and personnel should understand. The remaining chapters cover regulations applying to institutions and personnel.

Consistent with prior issues of the rule book, it is intended that a minimum of regulations will be provided for the guidance of both inmates and employees so that the programs of the Department of Corrections may be conducted at all times in an orderly manner in keeping with its philosophy and objectives.

The regulatory language in this book is clarified as follows: "Must", "must not", "will" and "will not" are mandatory. "May" is permissive, subject to given conditions or alternatives.

Statements of policy have been identified as such rather than as rules and precede the related rules in each article. All policy and rules are considered regulations. Procedural detail necessary to implementation of these regulations has intentionally been omitted and will be found in appropriate departmental and institutional procedure manuals. It is not expected that such procedural manuals will be of general public interest, and sufficient copies are produced to meet departmental needs only. Interested persons outside the department may review the manuals by prearrangement with my office or with the head of any departmental institution. Copies of portions of the manuals may be provided, at cost of producing the copies, at administrative convenience.

As it becomes later necessary to modify an existing regulation or add a new one, an Administrative Bulletin will be issued containing the change to be made. Suitable arrangements must be made by the institution heads, Chief, Parole and Community Services

Division and central office division chiefs to inform all employees, inmates and other concerned persons of such changes.

As approved by the Director of Corrections, the institution heads have issued such additional regulations as are required for proper operation of their institutions. These are available to inmates and employees of the individual institutions. Inquiries regarding institutional regulations should be directed to the heads of the individual institutions.

A copy of the Rules and Regulations of the Director of Corrections will be provided to all inmates and personnel of the department and to appropriate governmental agencies. Other interested persons may obtain copies at overhead cost. Please write to my office for ordering instructions.

R. K. Procunier
Director of Corrections
State Building No. 8
714 P Street
Sacramento, California 95814

July 1974

Article 5. Inmate Discipline

POLICY

DP-4501. *General.* Inmate discipline will be so administered as to maintain proper control, conserve human values and individual dignity, and to promote socially desirable changes in attitude and behavior. Each institution head will develop and implement a plan for the administration of inmate discipline, following the letter and spirit of this article. The disci-

pline of inmates is the responsibility of every employee, regardless of work assignment.

DP-4502. *Fair and Impartial Hearing Body.* Personnel involved in the incident leading to a disciplinary charge, the investigating employee, the reporting employee, and any person who has a predetermined belief that a disciplinary charge is true, must not sit as a factfinder in a disciplinary matter. A finding of guilt may be made only on the basis of a preponderance of the evidence presented at the hearing.

DP-4503. *Reporting of Rules Violations.*

1. *Minor Violations.*

   Minor acts of nonconformance to the basic rules of conduct necessary to the orderly operation of the institution may be handled, either without documentation or by recording the action on CDC Form 128a (custodial counseling chrono), and by correcting, counseling or advising the inmate regarding acceptable behavior. CDC Form 128a is to be used only for recording misconduct which has been corrected by the reporting employee and not referred to higher authority for further action. Whenever a CDC Form 128a is placed in an inmate's central file, a copy will be given to the inmate.

2. *More Serious Violations.*

   When the behavior of an inmate results in a more serious violation of the rules or of the law, it is the duty of any employee having knowledge of the

violation to report immediately the fact in writing on CDC Form 115, Rules Violation Report. The CDC Form 115 will contain a statement of the facts surrounding the charge. The inmate will be given a copy of the report and of all nonconfidential supplemental reports. No disciplinary hearing will be held until at least 24 hours after the inmate has received his or her copy of CDC Form 115, so that the inmate may prepare for the hearing.

3. The identity of the source of information upon which a disciplinary action is based may be kept confidential if disclosure would endanger the safety of the source or endanger institutional security.

Precautions must be taken to insure the reliability of any information received from an undisclosed source.

The fact of a confidential source will be documented in the information given to the inmate, and as much of the information received as can be disclosed without identifying the source will also be given to the inmate.

Any document relating information from a confidential source will also include an evaluation of the reliability of the source and a brief statement of the reasons for the conclusions reached.

No decision in a disciplinary proceeding may be based upon information from an undisclosed informant unless there is other information which corroborates that received from the source or un-

less the circumstances surrounding the event and the known reliability of the source satisfy the finder of fact that the information is true.

DP-4504. *Housing Pending Disciplinary Action.* When a CDC Form 115 report is filed, the inmate's housing status will not be changed unless additional controls are needed for the protection of staff or other inmates, or as a security measure. The ranking custodial officer on watch may order any inmate placed in segregation status if additional controls are deemed necessary, such action to be immediately reported in writing to the institution's classification committee.

DP-4505. *Disciplinary Action.* Each CDC Form 115 report must be examined by the appropriate disciplinary hearing officer as soon as possible. It will be examined by the chief disciplinary officer in the case of inmates with established release dates. Each report will be classified as Major, Serious or Administrative, according to the seriousness of the behavior reported. Once established these designations will not be changed except upon order of the chief disciplinary officer or the Warden/Superintendent.

With respect to administrative charges, the disciplinary hearing officer may dispose of the matter himself, or may delegate the responsibility to an appropriate employee with supervisorial duties. The disciplinary hearing officer will interview the inmate involved as soon as possible, but not later than 72 hours after receipt of the CDC Form 115. Additional information will be gathered if needed, and following a

thorough evaluation, one or more of the following dispositions may be made.

1. Dismissal of the matter, if the facts do not support the charge.
2. Counseling, with or without a reprimand.
3. Temporary suspension of privileges.
4. One or more weekend or holiday lockups.
5. Assignment to extra duty.
6. Confinement to quarters for a period of not more than five days.
7. Placing a hold on the inmate's trust fund when there is property damage or loss and the inmate refuses to sign a trust withdrawal slip to compensate for the damage or loss.

At any time that it appears that the matter is of a more serious nature than had been initially determined, the disciplinary hearing officer may terminate the handling of the matter and refer it to a higher level hearing.

When a CDC Form 115 is classified as a Serious charge, the matter will be heard by a senior disciplinary hearing officer, who will be designated by the institution head from among employees at the Correctional Lieutenant level or higher. When a CDC Form 115 is classified as a Major charge, the matter will be heard by either the disciplinary committee or the disciplinary subcommittee, as the institution head directs. The senior disciplinary hearing officer may refer a matter to a committee for hearing.

DP-4506. *Investigating Employees.* When a CDC Form 115 report is classified as a Major or Serious charge, the disciplinary hearing officer will inform the involved inmate of the right to the assignment of an investigating employee. Unless the inmate waives the privilege, and in all cases for an inmate with a release date, an investigating employee will be appointed by the chief disciplinary officer within 24 hours of the referral of the CDC Form 115 to a disciplinary committee or the senior disciplinary hearing officer. The inmate may not specify who will be assigned as the investigating employee. However, upon objection by the inmate to the investigating employee named, a new investigating employee may be assigned and a reasonable delay for further investigation granted. No employee will serve as investigating employee who was witness to the incident, or who is a disciplinary hearing officer or a member of the disciplinary committee which may consider the act of misconduct which is the cause of the CDC Form 115 report.

The investigating employee will interview the inmate concerned, the reporting employee and all others who may have information pertaining to the act or circumstances described in the report, and will seek information concerning both the facts of the alleged rules violation, and any mitigating circumstances. The investigating employee will have access to all available information concerning the inmate's act, and will receive cooperation from all institutional personnel, and will act as a neutral and unbiased investigator who seeks to assist the committee in its search for truth and

fairness in each matter. A copy of the investigating employee's report and any other nonconfidential supplemental reports which have been prepared in the case will be delivered to the inmate.

When an inmate with a release date is interviewed by the investigating employee, he will be informed that he has the right to request the attendance at the hearing of persons who have information relevant to the charges against him. Documentation of that advice and of the inmate's response will be made by the investigating employee.

The investigating employee will report to the committee chairman or senior disciplinary hearing officer on the relevance of information to be expected from witnesses requested by the inmate, and will also report on any security problem which would be a reason for a requested witness not to be present at the hearing.

DP-4507. *Major and Serious Charges.* The inmate must be present at the hearing concerning his conduct, unless he or she refuses to appear and use of force would be required to enforce attendance. No absentia hearing will be held when the inmate is mentally disturbed to an extent precluding meaningful participation, or when the inmate is an escapee at large.

The investigating employee must be present at the hearing unless excused by the inmate. The reporting employee or any other person whom the investigating employee or the committee chairman or senior disciplinary hearing officer believes may have pertinent information may be called to the meeting by the chair-

man or senior disciplinary officer. Questions may be asked of any person called to the meeting by the committee members, the senior disciplinary officer, the investigating employee, or, in the case of an inmate with a release date, the inmate. The committee chairman or senior disciplinary hearing officer will exercise control of all questioning to prevent lack of relevancy, harassment, abuse or repetitiveness.

When an inmate with a release date appears before the disciplinary committee or senior disciplinary hearing officer, any witnesses he or she invites to attend the hearing will normally be called to appear unless the committee chairman or senior disciplinary hearing officer finds specific reasons why one or more of them should not attend.

Reasons for not calling a witness may include, but are not limited to: danger to the safety of an informant by reason of disclosure of his or her identity, lack of relevant information or the unavailability of the witness. Institutional personnel with relevant information will be expected to attend the hearing if requested by the inmate or by the person conducting the hearing. The reasons for not calling any witness requested by the inmate will be documented, and a copy given to the inmate.

When an inmate without a release date appears before the disciplinary committee or senior disciplinary hearing officer, he or she may request the presence at the hearing of any person who will provide information favorable to his or her defense or in mitigation of the charges against him or her. Such a request may be

denied if the witness is not present in the institution, declines to appear voluntarily, is expected to provide the same information as other witnesses, has no personal knowledge of the circumstances of the offense, or if granting the request would endanger the security of the institution or be likely to result in retribution which would harm an individual. The reasons for not calling any witness requested by the inmate will be documented, and a copy given to the inmate.

Any employee who has information which relates to the charged violation or to the disposition of the charge will make that information known to the investigating employee, the senior disciplinary officer, or the disciplinary committee.

In all cases, when an inmate appears before the disciplinary committee or senior disciplinary hearing officer, he or she will be allowed to present documentary evidence in defense or mitigation of charges. Reasons for excluding documentary evidence include, but are not limited to, lack of relevance and repetitiveness. The reasons for excluding any documentary evidence will be documented and a copy given to the inmate. The committee or the senior disciplinary hearing officer may delay any decision in order to obtain further information. When the committee or senior disciplinary hearing officer is satisfied that the relevant information has been obtained, a determination must be made whether the inmate did the act which was reported on the CDC Form 115, and if it is decided that the inmate did the reported act, what disposition will be made of the matter.

The committee or senior disciplinary hearing officer must advise the inmate of the disposition of the matter at the conclusion of the hearing. A completed copy of the CDC Form 115 will be given to the inmate within three working days of the hearing. A statement by the factfinder as to the evidence relied on and the reasons for the finding reached will be recorded on CDC Form 115. The inmate will be given written information concerning the review which may be requested.

The senior disciplinary hearing officer may make any disposition of the matter which could have been made by a disciplinary hearing officer. In addition, he or she may impose one or more of the following:

1. Extended suspension of privileges.
2. Confinement in isolation status not to exceed five days.

The disciplinary committee may make any disposition of the matter which could have been made by either the disciplinary hearing officer or the senior disciplinary hearing officer, or may impose confinement in isolation status not to exceed 10 days.

Time spent in segregation pending the hearing will be credited toward any isolation sentence imposed, unless there is good cause not to grant credit.

DP-4508. *Referral to the District Attorney.* Felonies will be referred by the institution head to the district attorney for possible prosecution. The district attorney will be requested to advise the institution within five working days whether he will prosecute.

In all cases, institutional disciplinary consideration of the matter will be postponed until receipt of the district attorney's decision or the trial court's disposition of the case. The district attorney's decision or the trial court's disposition will be entered on the Form CDC 115.

When processing of a disciplinary action has been postponed pending criminal prosecution and the criminal proceedings terminate, the disciplinary process will be reactivated and carried to completion in each case. Regardless of the district attorney's or the court's disposition of the criminal charges and regardless of the disposition made by the disciplinary committee, the CDC Form 115 must reflect the finding of facts related to each act of misbehavior, including lesser acts for which criminal charges were not brought by the district attorney. Court conviction for a given act may be stated as proof that the act took place. Specific findings of fact must be made for other acts.

DP-4509. *Housing During Criminal Prosecution.* Any inmate transferred to specialized housing pending disposition of an incident referred to the district attorney will be referred immediately to the appropriate classification committee as detailed in the Classification Manual. The classification committee will determine, at its next regularly scheduled meeting, if the inmate will be returned to his regular program, admitted to a modified program or will be retained in a specialized housing unit pending final disposition by the district attorney.

In reaching its conclusion, the classification committee may consider the nature of the charges pending against the inmate in the criminal proceedings, and will assume the information stated in the report forwarded to the district attorney to be true. The classification committee should make every effort to place the inmate in as normal a program as possible under the circumstances. Continued retention in a specialized housing unit pending disposition of the charges by the district attorney is warranted only when:

a. The inmate has a record of assaultive or imminently assaultive behavior.

b. The inmate presents an escape risk of unusual seriousness or persistence.

c. The inmate has requested, or appears to require, protective custody.

d. A staff psychiatrist prescribes segregation based upon the inmate's mental condition.

e. The safety and security of the institution will be threatened if the inmate is not placed in restricted housing.

Normal classification committee procedures will be followed, except as follows:

The inmate will be advised that he does not need to appear before the committee. If he chooses to appear before the committee, he will be advised that he need make no statement and that the committee will ask no questions concerning the pending criminal charges. He will be advised that the committee is considering appropriate housing for him pending disposition of

the charges, and that he may give any information he wishes to the committee which would assist them in making that determination. He will be informed that anything he says may be used against him in court. Upon conclusion of the case, the classification committee will again review all information known to it concerning the inmate and determine appropriate placement.

*DP-4510. *Review of Disciplinary Disposition.* If an inmate is dissatisfied with the disposition of a disciplinary hearing, the inmate may request review of the matter by the chief disciplinary officer. If still dissatisfied, he or she may request review by the institution head. Either reviewing officer may confirm the decision, order further or new proceedings or modify or suspend the disposition made. If still dissatisfied, review by the Director may be requested. The inmate will be notified in writing of the right to request review.

Any person who has participated in a disciplinary process will not be used as a reviewing officer in that particular case. The institution head or his representative will assign the review to another appropriate person or refer it to the next higher level.

Any inmate request for review should be made within ten days of the action being protested. The inmate will be notified in writing of the results of any such review.

*DP-4511. *Records of Disciplinary Matters.* A copy of all documents prepared by the reporting employee,

*See revision of November 14, 1974.

the disciplinary hearing officer, the senior disciplinary hearing officer, the disciplinary subcommittee, the disciplinary committee, the chief disciplinary hearing officer, the head of the institution or the Director, with reference to any disciplinary matter will be placed in the inmate's central file.

DP-4512. *Actions Subsequent to Disposition.* Dismissal, change or reduction of a disciplinary matter reported by an employee will be discussed with the employee at the employee's request. Time of confinement in isolation may be shortened by the chief disciplinary officer if he concludes that the inmate is ready to conform to the rules and that institutional discipline will be benefitted by such an action. Upon completion of action by a disciplinary committee or the senior disciplinary hearing officer, the matter may be referred to an appropriate classification committee for consideration of whether any change in the inmate's program or custody status should be made.

DP-4513. *Length of Confinement.* No inmate will be kept in confinement in isolation status longer than ten (10) days without the approval of the Director. If at the expiration of that time, the discipline and safety of the institution requires, an inmate will be referred to the institution's classification committee for appropriate programming.

No inmate will be confined to quarters or otherwise deprived of exercise as a disciplinary measure longer than ten days, unless, in the opinion of the Warden or Superintendent, he poses such an extreme management problem or threat to the safety of other inmates and staff that longer confinement is warranted.

The approval of the Director is required in such cases.

DP-4514. *Assistance to Inmates Unable to Prepare or Present Their Positions.* When the investigating employee, the senior disciplinary hearing officer, or the disciplinary committee determines that any inmate is unable, whether for personal reasons or by reason of the complexity of the case, to collect and present the information necessary for an adequate comprehension of the case and to articulate his position, the inmate's case-worker will be assigned to consult with the investigating employee and to act on behalf of the inmate to insure that the inmate's point of view is presented at the hearing.

DP-4515. *Misconduct by Inmates with Release Dates.* When an inmate with a release date fixed at less than maximum receives a Major or Serious CDC Form 115, the Classification and Parole Representative will present the matter to an Adult Authority Member or an Adult Authority Representative to determine whether the inmate should be released as scheduled or whether the case should be placed on special proceedings calendar for review by an Adult Authority panel. When an inmate with a release date receives an Administrative level CDC Form 115 or CDC Form 128-A, custodial counseling chrono, the Classification and Parole Representative will present the report to an Adult Authority Representative for audit and review.

A. B. No. 74/55

State of California
Department of Corrections
Sacramento 95814

November 14, 1974

Administrative Bulletin No. 74/55

To: Wardens and Superintendents; Regional Administrators; Departmental Staff

Subject: Revisions in Director's Rules and Regulations

Effective immediately DP-1003—Right to Administrative Review of Grievances, DP-4510—Review of Disciplinary Disposition, and DP-4511—Records of Disciplinary Matters, of the Rules and Regulations of the Director of Corrections, July, 1974 edition, are revised as follows:

DP-1003 *Right to Administrative Review of Grievances.* Each inmate has the right to appeal decisions, conditions or *policies* affecting the inmate's welfare. Each institution head must provide a system whereby an inmate may request and receive administrative review of any problem or complaint. Such reviews will involve upper level staff and will insure that the complaint receives timely, courteous and considerate attention. The institutional appeals procedure will apply to all areas of complaint except the Adult Authority hearing process which has a special appeal or review procedure.

DP-4510 *Review of Disciplinary Dispositions.* If an inmate is dissatisfied with the disposition of a disciplinary hearing, the inmate may request

review of the matter by *submitting a CDC Form 602, Inmate/Parolee Appeal Form, to the Institutional Appeals Associate, who depending on institutional procedures, will either review the matter or refer it to the appropriate staff member for first level review. If still dissatisfied, the inmate may request review by the institution head who will either review the matter or refer it to the staff member designated as the second level reviewer.*

If the second level review is accomplished by other than the institution head, the final decision must be reviewed and approved by the institution head. If still dissatisfied, review by the Director may be requested.

At the disciplinary hearing, the inmate will be notified, in writing, of the right to request review.

Any person who has participated in a disciplinary process will not be used as a reviewing officer in that particular case. The institution head or his representative will assign the review to another staff member or refer it to the next highest level.

Any inmate request for review should be within ten days of the action being protested. The inmate will be notified in writing of the results of any such review.

DP-4511 *Records of Disciplinary Matters.* A copy of all documents prepared by the reporting employee, the disciplinary hearing officer, the senior disciplinary hearing officer, the disciplinary sub-committee, the disciplinary committee, the chief disciplinary officer, the institution head or the Director with reference to any discipli-

nary matter will be placed in the Central File, *except those adjudicated not guilty.*

All CDC Form 115's and accompanying documentation adjudicated not guilty will be placed in the appropriate stuff file per procedures outlined in Chapter IV, Section 13 of the Classification Manual.

Please take the necessary steps to insure that all employees and inmates are informed of these revisions. This bulletin will remain in effect until incorporated into the Director's Rules and Regulations.

/s/ R. K. Procunier
R. K. Procunier
Director of Corrections